Team 30P - Original

No. 22-695

IN THE

SUPREME COURT OF THE UNITED STATES

FRANNY FENTY

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourteenth Circuit

Brief For Petitioner

Team 30P
Counsel for
Petitioner

STATEMENT OF THE ISSUES

I. Whether society recognizes a reasonable expectation of privacy in sealed mail – a general class of effects entitled to full Fourth Amendment protection – when the mail is addressed to an alias or pseudonym that has been publicly used over several years so that the defendant and pseudonym are in effect the same person?

II. Whether statements that fulfill the textual requirements of the Federal Rules of Evidence Rule 803(3) of should nevertheless be inadmissible because of a judicially created spontaneity requirement when both statements express the declarant's current state of mind and were made within forty-five minutes of each other?

III. Whether a prior petit larceny conviction meets the rigid standard for impeachment under Rule 609(a)(2) of the Federal Rules of Evidence when petit larceny is generally not a crime involving dishonesty or false statements, the offense statute lacked any requirement of deceit, and the factual circumstances underlying the conviction did not involve deceit?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant statutory provisions include 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi); Boerum Penal Code § 155.25 and 155.45. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

I. Statement of the Facts

Franny Fenty (hereinafter "Ms. Fenty"), an aspiring novelist, was led astray when she tried to make ends meet. (R. at 44-45.) Ms. Fenty lacked familiarity with both prescription and recreational drugs; her only knowledge arose after Angela Millwood lured her into a plan to ease aging horses' pain. (R. 44-46, 57.) Around the same time, Joralemon saw a rise in deadly street drugs. (R. at 8.) In early February 2022, the DEA investigated an overdose connected with a veterinary package. (R. at 8.) On February 14, DEA agents took possession and opened two packages from Holistic Horse Care to Jocelyn Meyer. (R. at 65.) The DEA had no other information about the packages or the recipient to suspect illegal drug activity. (R. at 37-38.)

A. Ms. Fenty's record of employment and professional identity predominantly consists of writing short stories and novels under the pen name of Jocelyn Meyer.

Ms. Fenty was recognized by her college magazine, the Joralemon College Zine, two

times. (R. at 4.) Both editions during 2016–2017 listed Ms. Fenty's writing under her pen name Jocelyn Meyer. (*Id*.) Once Ms. Fenty graduated, she continued her work writing novels. (R. at 42.) Jocelyn Meyer was the listed author of all five novels. (*Id*.) Ms. Fenty highly valued privacy because of the intimate details of her life revealed as an author. (R. at 43.) Using the pen name Jocelyn Meyer allowed Ms. Fenty to retain additional privacy. (*Id*.)

When Ms. Fenty explored professional opportunities, she contacted publishers under her pen name. (R. at 43.) These communications were sent from Jocelyn Meyer using the email address jocelynmeyer@gmail.com. (*Id*.) Ms. Fenty's pen name was the only name used for correspondence with publishers. (R. at 5, 13.)

B. Ms. Fenty's conduct arose out of a work opportunity presented to her on LinkedIn for the purpose of pain management in horses.

On December 28, 2021, Ms. Fenty posted on LinkedIn she was looking for new employment opportunities as a writer. (R. at 6.) Ms. Fenty also mentioned her experience as a server, barista, and dealing with animals and kids. (*Id*.) Angela Millwood (hereinafter Ms. Millwood) responded and offered to help Ms. Fenty with a job opportunity. (*Id*.) Ms. Millwood was a prior classmate at Joralemon High School. (R. at 43.) Ms. Millwood's employment was listed as a horse handler at Glitzy Gallop Stables. (R. at 6.) Any connection between Ms. Fenty and Ms. Millwood was unknown until after the packages were opened. (R. at 34.)

Ms. Fenty believed Ms. Millwood wanted help in her mission to ease aging horses' pain. (R. at 44.) Ms. Millwood expressed deep care for the horses and a love for her job. (*Id*.) Ms. Fenty understood the plan was to administer muscle relaxants to help the horses' pain, but she had to order the medication because of Ms. Millwood's job. (R. at 45.) Knowing their shared financial hardships, Ms. Fenty did not think Ms. Millwood would jeopardize her job. (*Id*.) Ms. Fenty was unfamiliar with horse medication and relied on Ms. Millwood's expertise.

(R. at 45.) Ms. Millwood reassured Ms. Fenty the medication was only for horses. (R. at 46.)

C. DEA Agents possessed and opened two packages addressed to Ms. Fenty's pen name as a part of their systematic targeting of the post office for drug activity.

The city of Joralemon has struggled with high drug activity and some officers specifically sought employment in Joralemon because of this. (R. at 35-36.) Officers targeted the post office for drug investigations because of the number of cases involving the mail. (R. at 36.) Post office inspectors can flag and open packages on suspicions of drug trafficking. (*Id*.)

On February 12, 2022, law enforcement investigated the death of a Joralemon resident. (R. at 29.) Special Agent Raghavan instructed the employees of the Joralemon Post Office to look for packages from horse veterinarian companies because a package sent from Holistic Horse Care was found near the decedent's body. (R. at 29-30). Joralemon had no history of drug activity related to horse medications before February 12th. (R. at 29.)

On February 14th, the Post Office flagged but did not open, two packages from Holistic Horse Care sent to Jocelyn Meyer. (R. at 30.) Two other packages from Amazon were set aside that were addressed to Ms. Fenty. (R. at 31.) Each package was addressed to P.O. Box 9313 registered to Jocelyn Meyer. (R. at 30-31.) Special Agent Raghavan wanted to take matters into his own hands and opened the Holistic packages, instead of the usual Postal Inspectors, after he obtained a search warrant. (R. at 37.) Each package contained one bottle labeled "Xylazine: For The Horses." (R. at 31.) It was discovered the Amazon packages contained face cream. (R. 38.)

The same day, Ms. Fenty received delivery confirmation for her packages. (R. at 46.) When Ms. Fenty went to retrieve her mail, the packages were not in her P.O. Box. (*Id*.) Ms. Fenty then left Ms. Millwood two voicemails; the first was at 1:32 pm where Ms. Fenty stated she *just* got to the post office and discovered the packages were *missing*. (R. at 40.) Ms. Fenty spoke to postal workers who said they did not know what happened, but to check back

tomorrow. (*Id*.) Ms. Fenty conveyed that update and her confusion to Ms. Millwood at 2:17 pm. (*Id*.) The record does not state Ms. Fenty was told her packages were intercepted, which would have destroyed the effectiveness of a controlled delivery. (*See* R. at 32, 40, 46.) The DEA later learned Ms. Millwood left the country that day on a one-way flight. (R. at 35.)

It was not until the next morning, February 15th, that DEA agents resealed the packages for a controlled delivery. (R. at 32.) A slip was placed in P.O. Box 9313 to make the owner go to the counter. (*Id*.) A woman went to the P.O. Box, unlocked it, retrieved the Amazon package, and took the slip to the counter. (*Id*.) The manager asked the woman if the Holistic Horse Care packages belonged to her, and she responded, "Yeah, they're mine." (R. at 33.) The woman spoke to another patron, a former classmate, who told DEA agents her name. (*Id*.) Agent Raghavan confirmed Ms. Fenty identified as both Franny Fenty and Jocelyn Meyer. (*Id*.)

II. Procedural History

An indictment was returned against Ms. Fenty on February 15, 2022, for One Count of Possession with Intent to Distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(vi). (R. at 1-2.) Ms. Fenty was arrested that same evening. (R. at 34.) Ms. Fenty moved to suppress the evidence obtained through the search of her sealed packages under the Fourth Amendment. (R. 10.) Ms. Fenty also moved to exclude her six-year-old petit larceny conviction. (R. at 19.) Despite recognizing that the majority of Circuits uphold a reasonable expectation of privacy in mail using fictitious names, the United States District Court for the District of Boerum denied Ms. Fenty's motion. (R. at 15-17.) The Court also refused to exclude the past conviction because Boerum Penal Code § 155.25 was interpreted to meet 609(a)(2)'s requirements. (R. at 26.) Finally, Ms. Fenty moved to admit two exhibits while testifying at her trial. (R. at 46-47.) The exhibits were two voicemails that established Ms. Fenty's confusion and uncertainty while

at the post office. (R. at 40.) The Court again denied Ms. Fenty's motion (R. at 51.)

Ms. Fenty raised three issues on appeal to challenge her conviction. (R. at 65.) A divided panel for the Fourteenth Circuit affirmed the District Court on all three issues, holding; (1) the search of the sealed packages did not violate the Fourth Amendment, (2) Ms. Fenty's voicemail statements did not qualify under the 803(3) hearsay exception, and (3) impeachment concerning her petit larceny conviction was proper under 609(a)(2). (R. at 65) Judge Hoag-Fordjour wrote a dissenting opinion related to each issue. (R. at 71–73.) On December 14, 2023, this Court granted Ms. Fenty's petition for writ of certiorari (R. at 74.)

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit incorrectly examined the reasonableness of a privacy expectation in receiving mail under a fictitious name to conclude Ms. Fenty's Fourth Amendment rights were not implicated. Under either the "other indicia" test or a connection to the fictitious name, Ms. Fenty established a reasonable expectation of privacy. A large majority of the Circuits recognize this expectation of privacy and Ms. Fenty would have met her burden in each of them. Society accepts the reasonableness of remaining anonymous when sending or receiving mail for several legitimate reasons. There is nothing inherently wrong with using a pseudonym or fictitious name and that alone does not diminish the privacy expectation. Finally, Fourth Amendment rights do not depend on the nature of the petitioner's activity, so protection cannot be rescinded merely because law enforcement discovers criminal activity.

Ms. Fenty's voicemails were improperly excluded despite fulfilling the textual requirements demanded by 803(3). Instead, the Fourteenth Circuit excluded the statements based on a common law spontaneity requirement not approved of by the drafters of the Federal Rules of Evidence. This holding ignores the jury's essential role of weighing the credibility of

witnesses and improperly gives that power to the judge to exclude "self-serving statements," despite precedent expressly disallowing that. Further, the Fourteenth Circuit's assertion that the statements were not spontaneous is flawed because the statements were an expression of her emotions and thoughts about the missing packages as the events unfolded.

Ms. Fenty was erroneously impeached with evidence of her prior conviction for petit larceny. 609(a)(2) limits prior conviction evidence to crimes that involve dishonesty or a false statement. Petit Larceny fails to qualify as a crime on its face that would qualify under 609(a)(2). The Fourteenth Circuit incorrectly decided when looking at the facts of Ms. Fenty's prior conviction that it was a crime of deceit, which is admissible under 609(a)(2). However, this is in error, as the underlying facts demonstrate no dishonesty or false statements. Rather, Ms. Fenty's petit larceny was committed as a crime of stealth or force, which is outside of 609(a)(2)'s admissibility. Finally, a jury instruction was insufficient to mitigate the prejudicial harm imposed on Ms. Fenty because the jury heard intimate details about her conviction.

ARGUMENT

I. Ms. Fenty had standing to challenge the DEA's search of her sealed mail addressed to her pen name, Jocelyn Meyer, because she subjectively believed the contents of her mail would be kept private by addressing the mail to a name that she – and no one else – identified as, which society is prepared to recognize as reasonable.

One of the most fundamental protections afforded by the United States Constitution lies in the Fourth Amendment, wherein citizens are guaranteed to be free from unreasonable searches and seizures. U.S. Const. amend. IV. The erroneous decisions of the District Court and Fourteenth Circuit cast a dark cloud over this protection by holding that all of society must be deprived of anonymity in mail to punish the few who abuse it. The reasonableness of a privacy expectation cannot depend on the after-the-fact discovery of criminal activity under a fictitious name. Upholding that principle would condone an intrusion the Constitution does not tolerate.

Ms. Fenty subjectively believed the sealed contents of packages addressed to her pen name Jocelyn Meyer would remain private, and society, along with the clear majority of Circuit Courts, accepted that expectation as reasonable. Almost every Circuit recognizes that a reasonable expectation of privacy may be established in sending and receiving mail under alternative names. The Circuit "split" is best characterized as *how* courts will determine the reasonableness of that expectation, rather than whether it *can* be reasonable. Thus, the judgment of the Fourteenth Circuit denying Ms. Fenty's motion to suppress must be reversed.

The Fourth Amendment is triggered if evidence is secured through a search that violates the defendant's own rights. *Rakas v. Illinois*, 439 U.S. 128, 134, 99 S. Ct. 421, 425 (1978). A motion to suppress, then, must involve the defendant's personal Fourth Amendment rights. *See id*. at 133. This Court clarified the inquiry is not a separate "standing" analysis. *Id*. at 139-40. The ultimate inquiry is "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Id*. at 140.

To fall within the Fourth Amendment, a petitioner must prove they had "a legitimate expectation of privacy in the invaded place." *Id.* at 143. This is a two-part test; (1) the defendant must have had a subjective expectation of privacy, and (2) the expectation must be one that society accepts as reasonable. *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516 (1967) (Harlan, J., concurring). The petitioner has the burden to prove a reasonable expectation of privacy. *Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S. Ct. 2556, 2561 (1980).

A. Ms. Fenty's conduct and testimony established a subjective belief that the contents of her sealed package would be kept private because she personally placed the order under her pen name, which was created to maintain privacy, and paid for its delivery to her P.O. Box.

The first requirement under the *Katz* test requires the petitioner to show an actual expectation of privacy. *United States v. Campbell*, 434 F. App'x 805, 809 (11th Cir. 2011). In other words, the petitioner must show their conduct was meant to keep something private, so they believed it would indeed remain private. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580 (1979). This is a low bar that is often uncontroverted. *See, e.g.*, *United States v. Rose*, 3 F.4th 722, 741 (4th Cir. 2021) (the petitioner had an "undisputed subjective expectation of privacy" in two packages he intended to receive despite addressing them to a deceased person). Even a burglar can prove a "thoroughly justified subjective expectation of privacy" in a vacation cabin in the offseason. *Rakas*, 439 U.S. at 143 n.12.

Individuals manifest an actual privacy belief by placing items in closed, opaque containers so the contents cannot be seen. *United States v. Villarreal*, 963 F.2d 770, 773 (5th Cir. 1992). The type of container seldom matters and mailing the container does not destroy the expectation of privacy. *Id*. "Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy." *United States v. Jacobsen*, 466 U.S. 109, 114, 104 S. Ct. 1652, 1657 (1984). The private nature of mail is essentially

indisputable as people often mail confidential and intimate information and reasonably expect privacy. *United States v. Richards*, 638 F.2d 765, 774 (5th Cir. 1981).

Ms. Fenty established an actual expectation of privacy in the two packages sent to her P.O. Box under her pen name Jocelyn Meyer. Ms. Fenty testified that she used the name Jocelyn Meyer because she wanted privacy in her writings. (R. at 43.) She likewise wanted to maintain privacy when she opened P.O. Box 9313. (R. at 43.) Opposing counsel confirmed Ms. Fenty, acting as Jocelyn Meyer, was the one who opened the P.O. Box and ordered from Holistic Horse Care. (R. at 54-55.) Ms. Fenty reiterated she did so because she wanted privacy. (R. at 55.) Ms. Fenty's expectation is far more concrete than the petitioner in *Rose* who indisputably had a subjective expectation of privacy in mail addressed to a deceased person. Further, if a burglar has a justified expectation of privacy in a home that does not belong to them, surely Ms. Fenty is justified in expecting privacy in mail that both parties acknowledge she paid for. Ms. Fenty subjectively expected privacy in the contents of her sealed, opaque packages sent through the mail which are effects entitled to Fourth Amendment protection. (R. at 37.)

B. A clear majority of Circuits recognize a reasonable expectation of privacy in the contents of sealed mail addressed to aliases and pseudonyms when the petitioner shows ownership and control over the package, or some level of connection to the fictitious name.

To claim Fourth Amendment protection, the petitioner's subjective expectation of privacy must be recognized by society as reasonable. *Smith*, 442 U.S. at 740. This means the expectation must have been justified in light of the factual circumstances. *Id*. If an item or area that society recognized as having a reasonable expectation of privacy was searched, the intrusion was unreasonable. *Jacobsen*, 466 U.S. at 113. As stated above, letters and sealed packages are an "effect" under the Fourth Amendment entitled to full protection because society recognizes that expectation as legitimate. *Id.* at 114. Thus, this analysis begins with the

general presumption that intrusions on individuals' privacy in their mail are unreasonable.

Circuit Courts vary in *how* they approach privacy expectations when a petitioner uses an alias, pseudonym, or fictitious name to send or receive mail. Courts lack a "...talismanic test to determine whether an expectation of privacy is one that society is prepared to accept as reasonable." *United States v. Johnson*, 584 F.3d 995, 999 (10th Cir. 2009). The Fourteenth Circuit's judgment, which rejected Ms. Fenty's expectation of privacy, was a patchwork application of negative language from other Circuits' decisions. The Fourteenth Circuit failed to apply the Circuits' tests and ignored nuanced differences. Almost every Circuit to address this issue has held that a reasonable expectation of privacy may be established using an alias if there are other indicia of ownership or connections to the name. Importantly, Ms. Fenty's expectation is not one involving a stolen identity, nor was her alias solely used for a criminal enterprise.

1. Ms. Fenty's expectation of privacy in the contents of sealed packages addressed to Jocelyn Meyer was reasonable under the First, Fourth, and Eighth Circuits' "other indicia" test given her ownership and control of the packages and delivery.

Three Circuits employ an "other indicia" test to determine whether a petitioner has a reasonable expectation of privacy in mail when their legal name is not the listed sender or recipient. *United States v. Stokes*, 829 F.3d 47, 53 (1st Cir. 2016); *Rose*, 3 F.4th at 727; *See also United States v. Lewis*, 738 F.2d 916, 919 n.2 (8th Cir. 1984). Contrary to the government's assertion that there is no reasonable expectation of privacy if the petitioner is not the listed sender or addressee, the second half of that statement is qualified with the absence of any other connection to the packages. *Stokes*, 829 F.3d at 52. The Fourteenth Circuit incorrectly applied the "other indicia" test because it did not address the facts that established Ms. Fenty's ownership and control of her packages and their delivery.

The First Circuit looks at the totality of the circumstances for indications of ownership,

possession, or control of the searched property to determine whether a privacy expectation was reasonable. 829 F.3d at 53. In *Stokes*, the defendant tried to claim a privacy interest in mail used to defraud businesses. *Id*. at 49. The defendant sent invoices under the guise of legitimate trade associations, but his name was not anywhere on the mail. *Id*. To prove ownership and control, the defendant made a blanket assertion that he had a "privacy interest" and that his personal address was on the envelopes. *Id*. at 53. Without more, the Court held the defendant did not have a reasonable expectation of privacy because the mail lacked any connection to him. *Id*.

The Fourth Circuit has outwardly acknowledged that petitioners can assert Fourth Amendment claims for packages under fictitious names. *Rose*, 3 F.4th at 728. Like the First Circuit, a reasonable expectation of privacy can be established with indicia of ownership, possession, or control of the packages. *Id.* at 727. When using a fictitious name, the defendant must show the fictitious name is an "established alias." *Id*. at 728.

Individuals cannot assert a reasonable expectation of privacy in packages not addressed to their legal names when their sole ownership interest is that of an intended recipient. *Id*. at 729; *United States v. Givens*, 733 F.2d 339, 342 (4th Cir. 1984). In *Rose*, the defendant had his packages sent to a friend's house addressed to the homeowner's deceased brother. 3 F.4th at 725. The packages were not addressed to an alter ego and nothing on the package connected it to the defendant. *Id*. at 729. The Court held the defendant had "no greater privacy interest in the packages than an airport bystander." *Id*. at 730. Similarly in *Givens*, packages were addressed to actual third parties, rather than a real or fictitious entity as an alter ego, which precluded the defendants from having a reasonable expectation of privacy. 733 F.2d at 341. The Court explained there is no merit in claiming "when A sends a package to B, the contents of which are ultimately intended for C, C is entitled to claim a privacy interest…" *Id*. at 342.

Finally, the Eighth Circuit has relied on a test much like the other indicia factors, though less explicitly. *See Lewis*, 738 F.2d at 919 n.2. In *Lewis*, the Court assumed the defendant had standing because the search was ultimately upheld on other grounds. *Id*. at 919-20. That said, the Court added in a footnote the defendant lacked a reasonable expectation of privacy because the name on the package did not live at the delivery address. *Id*. at 919 n.2. Rather than preclude a privacy expectation for that reason alone, the Court continued to examine the factual circumstances, such as whether the defendant had control over the mailbox and its contents. *Id*. For example, the Court noted the mailbox was unlocked and accessible to the public. *Id*.

The Fourteenth Circuit appeared to adopt the other indicia test, but the Court's inquiry prematurely ended without applying the factual record to assess what ownership, possession, or control interests Ms. Fenty had. The Fourth Circuit cases used to reject Ms. Fenty's reasonable expectation of privacy are plainly dissimilar and inapplicable. (R. at 67.) Ms. Fenty was the first and only point of contact for the packages' delivery and she was the only one who could assert ownership. (R. at 46, 54.) Unlike the defendants in *Rose* and *Givens*, Ms. Fenty did not set up a roundabout delivery scheme from person A to B to assert a privacy interest as person C. Ms. Fenty was person B; the packages were addressed to Jocelyn Meyer, which is a pseudonym she used on several prior occasions. (R. at 30, 42, 46.) The Fourteenth Circuit erroneously relied on *Givens* to conclude Ms. Fenty's privacy interest was unreasonable. (R. at 67.) Unlike the defendant in *Givens*, Ms. Fenty's role was not limited to an intended recipient. Ms. Fenty was at all times the actual owner of the packages because Jocelyn Meyers *is* Franny Fenty.

The totality of the circumstances reveals Ms. Fenty had a reasonable expectation of privacy in the sealed contents of the packages addressed to Jocelyn Meyer in the First, Fourth, and Eighth Circuits. First, Ms. Fenty placed the order and paid for the packages' contents and

delivery. (R. at 58.) Ms. Fenty used her pseudonym, Jocelyn Meyer, to open her P.O. Box and receive packages. (R. at 43.) The Post Office issued Ms. Fenty a P.O. Box under her pseudonym on January 21, 2022. (R. at 31.) DEA surveillance noted that Ms. Fenty needed to unlock her P.O. Box, meaning the packages were not in an unlocked container accessible to the public like in *Lewis*. (R. at 32.) She also received delivery confirmation, which Ms. Fenty could have shown the Post Office to establish her ownership interest. (R. at 46.) Unlike *Stokes*, the factors supporting Ms. Fenty's expectation of privacy are far beyond reliance on an address alone.

Ms. Fenty's use of the pseudonym Jocelyn Meyers has stretched over a span of five years. (R. 4, 5, 31, 43.) Ms. Fenty's pseudonym is used in aspects of life she wishes to keep private, such as the intimate details exposed in her writing. (R. at 42-43, 55.) Jocelyn Meyer is not the name of an actual third party and it was the only recipient listed on the packages. (R. at 30.) No one else had an ownership claim over the mail. Ms. Fenty controlled the packages' delivery and could exclude others from taking possession. Under the totality of the circumstances and the fact that privacy interests can be reasonable using pseudonyms, Ms. Fenty carried her burden in each of these Circuits contrary to the Fourteenth Circuit's superficial holding.

2. Individuals are entitled to Fourth Amendment protection when sending and receiving mail despite using a name other than their legal name in the Fifth, Seventh, Tenth, and Eleventh Circuits because society recognizes the reasonableness of maintaining privacy and anonymity in mail.

The Fifth, Seventh, and Eleventh Circuits have affirmatively held that petitioners have a reasonable expectation of privacy in sending and receiving mail using fictitious names. *Villarreal*, 963 F.2d at 774; *United States v. Pitts*, 322 F.3d 449, 459 (7th Cir. 2003); *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009). The Tenth Circuit has supported this position in reasoned dicta. *Johnson*, 584 F.3d at 1002. The Fourteenth Circuit failed to note the meaningful distinction between mail addressed to a real third party from an

alias the petitioner identified as. Society does not recognize an intended recipient's privacy expectation as reasonable when the package was addressed to a real third party. There is also no privacy expectation in mail if the petitioner fraudulently used another's identity. But society does recognize a reasonable expectation of privacy in mail addressed to an alias or pseudonym when the petitioner has a connection to that name. Whether an alias was used for criminal activity cannot after-the-fact eviscerate the Fourth Amendment protection.

The Fifth Circuit "has made clear that individuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names." *Villarreal*, 963 F.2d at 774. In *Villarreal*, the defendants addressed two drums to 'Roland Martin' despite that not being either of their legal names. *Id*. at 772. They explicitly used a fictitious name so that the drugs in the containers were not tied to them, and other people were paid to pick up the packages. *Id*. at 773. Still, one defendant had the receipt for the containers and the other identified himself as Roland Martin. *Id*. at 774. Under those circumstances, the Court found that both defendants had a legitimate expectation of privacy in the searched containers. *Id*. at 775. The defendants "never denied their possessory interest" and "consistently acted as if they were the ones who were to receive the drums." *Id*.

Even before *Villarreal*, the Fifth Circuit upheld a reasonable expectation of privacy in aliases. *Richards*, 638 F.2d at 770, cert. denied, 454 U.S. 1097, 102 S. Ct. 669 (1981). The Court found a reasonable expectation of privacy in a sealed package addressed to Mehling even though the defendant's name was Raymond Richards. The defendant opened a P.O. Box, pretending to be Christopher Thompson, and registered it to Mehling Arts & Crafts. *Id*. at 767. Even though the defendant denied ownership when confronted by law enforcement, he still had a reasonable expectation of privacy. *Id*. at 770. The package was "sealed and addressed to

Mehling, which, in effect, was Richards." *Id*. This Court notably denied certiorari.

The Eleventh Circuit adopted the Fifth Circuit's holding that petitioners have reasonable expectations of privacy in packages addressed to fictitious names. *Garcia-Bercovich*, 582 F.3d at 1238. The Court succinctly concluded that the defendant, Angel Garcia-Bercovich, was able to challenge the search of a package addressed to "Angel at Natural Heat Systems." *Id*. The listed recipient's name was made up to perpetuate a large-scale drug trafficking scheme. *Id*. at 1236. The Eleventh Circuit has reiterated a privacy expectation in mail not addressed to the defendant's name is reasonable if there is a connection between the defendant and the addressee. *Campbell*, 434 F. App'x at 809.

The Seventh Circuit has recognized that petitioners have a right to use false names in sending and receiving mail while maintaining a reasonable expectation of privacy. *Pitts*, 322 F.3d at 459. In *Pitts*, the Court reasoned "there is nothing inherently wrong with a desire to remain anonymous" and that "using an alias in sending or receiving mail is one [expectation of privacy] that society is prepared to recognize as reasonable. *Id*. For example, authors and journalists may use a pseudonym, their *nom de plume*, when receiving mail "because of a desire to preserve as much of one's privacy as possible." *Id*. at 458. The same can be said for celebrities concerned for safety or executives under confidentiality. *Id*. Although society recognizes a reasonable expectation of privacy in aliases, the defendants in *Pitts* could not challenge the search because they abandoned the package. *Id*. at 454.

Ms. Fenty's packages addressed to her pseudonym Jocelyn Meyer fit squarely within the Fifth, Seventh, and Eleventh Circuits' recognition of a reasonable expectation of privacy. Like the defendants in *Villarreal*, Ms. Fenty had the receipt and delivery confirmation for her packages. (R. at 46, 58.) When asked by the Postal manager if the packages sent to Jocelyn

Meyer belonged to her, she answered affirmatively. (R. at 33.) Ms. Fenty also identified herself as Jocelyn Meyer to book publishers. (R. at 5.) Ms. Fenty consistently acted as if the packages belonged to her and had a preexisting connection to the packages' addressee. (R. at 42.) Ms. Fenty's desire to remain anonymous in some aspects of life is not unreasonable nor uncommon. In fact, a *nom de plume* was specifically referenced as a legitimate example of privacy in mail.

Individuals do not have a reasonable expectation of privacy in fictitious names when they deny their connection to that name. *United States v. Daniel*, 982 F.2d 146, 149 (5th Cir. 1993). In *Daniel*, the defendant challenged the search of a box addressed to "Lynn Neal c/o Dottie's Hair Design." *Id.* at 148. The Fifth Circuit held the defendant, Ricky Lynn Daniel, did not have a reasonable expectation of privacy. *Id*. at 149. At trial, the defendant specifically denied his connection to the alias for his defense that he and the packages' addressee were different people. *Id*. Privacy expectations are unreasonable when the defendant does not show that they used the name on the package as an alias and instead distanced themselves from the addressee. *Campbell*, 434 F. App'x at 809.

Courts reach the same conclusion when individuals assert a privacy interest in mail addressed to a third party that they distanced themselves from. *United States v. Koenig*, 856 F.2d 843, 846 (7th Cir. 1988); *See also United States v. Pierce*, 959 F.2d 1297, 1303 n.11 (5th Cir. 1992) (no expectation of privacy in mail addressed to a third party instead of an alter ego and the defendant continually dissociated himself from the package). In *Koenig*, the defendant did not have a privacy interest because his name was not on the package, he never claimed to be an owner, and instead argued his role was limited to a buyer. 856 F.2d at 846. Similarly, there is no reasonable expectation of privacy in mail when the petitioner crossed their name and address out to replace it with a third party. *United States v. Smith*, 39 F.3d 1143, 1144–45 (11th Cir.

1994). The petitioner in *Smith* effectively became an intended recipient with ambiguous testimony about his ownership interest, so his privacy interest was too remote. *Id*. at 1145.

These circumstances where there is no reasonable expectation of privacy are factually dissimilar to Ms. Fenty's claim. As noted in subsection 1, Ms. Fenty did not assert a privacy interest as an intended recipient. The searched packages were addressed to Jocelyn Meyer, her pen name, rather than the real name of a third party. (R. at 30.) The order was placed under Ms. Fenty's pseudonym, the package was addressed to that name, and it was delivered to a P.O. Box bearing that name. (R 30, 31 43.) Ms. Fenty acknowledged her use of the pseudonym Jocelyn Meyer in both her writing and these packages. (R. at 42-43, 33.) Ms. Fenty never distanced herself from the name Jocelyn Meyer. Instead, Ms. Fenty openly acknowledged her ownership of the packages despite her concern for the delayed delivery. (R. at 33, 40.) Ms. Fenty carried her burden to establish the reasonableness of her privacy expectation and none of the circumstances that prevent a reasonable privacy interest under a fictitious name are present.

i. The reasonableness of a privacy expectation cannot depend on the after-the-fact discovery of criminal activity under the fictitious name without upending this Court's Fourth Amendment precedent.

Fourth Amendment protection cannot be rescinded after a reasonable expectation of privacy was established in mail addressed to a fictitious name merely because law enforcement discovered the alias was used to commit a crime. *Pitts*, 322 F.3d at 458. This is because "privacy expectations do not hinge on the nature of the defendant's activities—innocent or criminal." *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997). Any other holding would either deprive everyone with real privacy concerns of their Fourth Amendment rights, or only deprive those who used the fictitious name for criminal purposes. *Pitts,* at 458. The latter would allow law enforcement to justify unconstitutional searches because the "illegal contents of the

package serve as an after-the-fact justification." *Id*. Officers cannot know if packages contain contraband before opening them, and this Court cannot condone such an intrusion. *See id*. On the other hand, law-abiding citizens' privacy rights should not be undermined by disregarding the reasonableness of receiving mail under a fictitious name. *Rose*, 3 F.4th at 739.

That conclusion must be kept separate from the initial rejection of a reasonable privacy expectation because the petitioner fraudulently used another's identity to send or receive mail. *Johnson*, 584 F.3d at 1001. There is a meaningful difference between using an alias and fraudulently using an identity that belongs to someone else. *Id*. at 1002. It is not illegal to use a pseudonym or alias, but identity theft harms innocent third parties. *Id.* Further, the right to object to the search would belong to a third party, namely the person whose identity was stolen, rather than the petitioner because Fourth Amendment rights are personal.

Ms. Fenty's Fourth Amendment rights cannot "bend to every whim and caprice of law enforcement." (R. at 71.) Ms. Fenty's reasonable expectation of privacy in the sealed contents of mail addressed to Jocelyn Meyer cannot be revoked because law enforcement happened to find what they were targeting the post office for. (R. at 36.) The Fourteenth Circuit erroneously relied on *Daniel* for the assertion that aliases used in a criminal scheme are invalid. The *Daniel* Court's denial of a privacy expectation had nothing to do with the criminal use of the alias and the question was merely raised in dicta. Even using the mistaken reasoning of the Fourteenth Circuit, Ms. Fenty's pseudonym was not solely used for criminal activity. (R. at 4-5.)

In sum, Ms. Fenty carried her burden for a subjective expectation of privacy in packages addressed to her pseudonym Jocelyn Meyer. Society accepts this expectation as reasonable. This is the well-reasoned position of at least seven Circuits where ownership or control or a connection to the fictitious name is proven. The Fourteenth Circuit's rejection of a privacy

expectation reflects a misapplication of the Circuits' cases. Sustaining charges against Ms. Fenty for conduct that occurred under the name Jocelyn Meyer yet refusing Fourth Amendment protection under that same name lacks common sense. The judgment of the Fourteenth Circuit must be reversed and remanded with instructions to evaluate the merits of Ms. Fenty's Fourth Amendment claim.

II. Whether statements that fulfill the textual requirements of the Federal Rules of Evidence Rule 803(3) should nevertheless be inadmissible because of a judicially created spontaneity requirement when both statements expressed the declarant's current state of mind and were made within forty-five minutes of each other?

The Fourteenth Circuit erred by excluding Ms. Fenty's voicemails under 803(3) because there is no spontaneity requirement in the text of the rule. By adding a requirement that was not intended by the Rules drafters, the Court erodes the exception. Even if this Court decides to embrace the judicially created rule, the Fourteenth Circuit incorrectly held Ms. Fenty's voicemails were not spontaneous to not meet the requirements of the judicially created rule. As such, this Court should reverse the Fourteenth Circuit's holding below and remand the case.

A. The Fourteenth Circuit's erroneous holding is inconsistent with the Federal Rules of Evidence because no spontaneity requirement exists and the holding encroaches upon the jury's essential purpose to determine the credibility of evidence.

By restrictively interpreting rule 803(3), the Fourteenth Circuit prevented Ms. Fenty's from utilizing a well-established exception to hearsay. Rule 803(3) allows the following information to serve as an exception to the rule against hearsay,

> "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed…" Fed. R. Evid. 803(3).

"Exception (3) is essentially a specialized application of Exception (1) presented separately to enhance its usefulness and accessibility." Fed. R. Evid. 803(3) advisory committee's note to 1975

amendment. Statements that explain a current thought or feeling are admissible, but statements describing memories are not. *See United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984).

The judge is to determine the "foundational facts conditioning the application of technical exclusionary rules." *Com. v. Bright*, 974 N.E.2d 1092, 1100–01 (Mass. 2012). Judges "evaluate three factors: contemporaneousness, chance for reflection [spontaneity], and relevance," when considering 803(3) evidence. *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980). When spontaneity is the only issue "most courts conclude that the hearsay should be admitted under Rule 803(3) even though the statement was not spontaneous," as the Federal Rules do not require it. *Kelly v. State*, 116 P.3d 602, 606 (Alaska Ct. App. 2005) (Manheimer, J., concurring).

Courts look at spontaneity because "the more time that elapses between the declaration and the period about which the declarant is commenting" the statement becomes less reliable due to a greater chance the memory will be erroneous or misrepresented. *Id.* However, it is the jury's task to determine if the evidence is reliable or valid. (R. at 72.) When judges restrict evidence based on untrustworthiness, they "encroach[] on the jury's essential purpose, which is to assess the credibility of admissible evidence." (R. at 72.); *See United States v. Peak*, 856 F.2d 825, 834 (7th Cir. 1988). Statements that fulfill 803(3) are "categorically admissible, even if they are self-serving and made under circumstances which undermine their trustworthiness." *United States v. Lawal*, 736 F.2d 5, 8 (2d Cir. 1984) (citing to *DiMaria*, 736 F.2d at 271). In *Lawal*, the Second Circuit overturned a decision that prevented the defendant from admitting statements under 803(3) despite their "self-serving" nature. *Id.* at 9. If a statement qualifies as an existing state of mind, emotion, sensation, or physical condition – the truth or falsity of the statement for the jury to decide (R. at 72.)

If the government wishes to challenge the validity of a declarant's statement under 803(3), the proper decision maker is the jury, not the judge. *United States v. Giles,* 246 F.3d 966, 974 (7th Cir. 2001). In *Giles,* the Seventh Circuit held that taped conversations between the defendant and an informant fulfilled 803(3) and should have been admitted even if there were "an attempt to cover his tracks in case he got caught." *Id.*

Moreover, judges should not exclude statements of a then-existing mental state of an accused person on the premise that there was "possible trickery." *DiMaria,* 727 F.2d at 271. That assessment of guilt towards a person not yet proven guilty "would be inconsistent with the presumption of innocence." *Id*. Under the Confrontation Clause of the Sixth Amendment, a defendant may object to a hearsay statement based on unreliability. *United States v. Harris*, 773 F.2d 994, 1005 (2d Cir. 1984). But this "protection" is not available to the government. *Id.* As argued by Judge Hoag-Fordjour, the proper course for the government to raise an unreliability argument would have been a 403 objection. (R. at 72.); *See also United States v. Miller*, 874 F.2d 1255, 1272 (9th Cir. 1989). Because 403 asks judges to weigh the probative value of the evidence against its prejudicial effect, a judge would have the authority to hold statements that may mislead the jury to be inadmissible. *Id.*

The Fourteenth Court's ruling usurped the role of the jury and the drafter's intent in creating 803(3). Concerning the judicially created admissibility test of 803(3), it is uncontested that Ms. Fenty's proffered evidence fulfills the relevance and contemporaneous prongs. (R. at 68.) Therefore, the only issue precluding admissibility is spontaneity. *Id.* The Fourteenth Court asserted Ms. Fenty's 803(3) proffer was inadmissible because "[d]efendants should not be rewarded for making self-serving statements that may mislead finders of fact" and the statements are not spontaneous. (R. at 68-69.) But "the truth or falsity of such declarations is for the jury to

determine, and their 'self-serving nature' goes only to their weight." *Lawal*, 736 F.2d at 8. Similar to the defendant's statements in *Lawal* and *Giles*, the trial court should have admitted Ms. Fenty's evidence as it fulfilled the textual requirements of 803(3).

Further, the prosecution did not raise a 403 objection below. Because there is no objection on the record, it is improper for the Fourteenth Circuit to consider 403 when making an 803(3) admissibility ruling. This Court should follow the reasoning in *DiMaria* to protect the role of the jury and a defendant's presumption of innocence by reversing and remanding the decision below. Without action, the judiciary will continue to overstep its constitutional parameters by following a judicially created guideline rather than rules adopted by the legislature.

B. Ms. Fenty's statements were spontaneous because they were made shortly after she discovered her packages were missing and described a condition that presently existed at the time of the statement.

Although judicially created requirements should not be read into 803(3), Ms. Fenty's voicemail statements were made spontaneously if this Court were to impose that requirement. A statement is spontaneous when "it is made without time to reflect or fabricate and is related to the circumstances of the perceived occurrence." *Spontaneous Declaration, Black's Law Dictionary* (11th ed. 2014); *See also People v. Moorer*, 683 N.W.2d 736, 740 (Mich. Ct. App. 2004). Spontaneous statements convey the declarant's then-existing state of mind, emotion, sensation, or physical condition and often are the "best and only conditions of the declarant's condition at the time in question."[1]

Statements about an existing mental and emotional feeling may refer back to a past event while still being admissible under 803(3), because "it is reasonable to believe the condition existed at the time of the utterance, as well." *State v. Flett*, 699 P.2d 774, 780 (Wash. Ct. App.

[1] Jay M. Zitter, *Admissibility of evidence of declarant's then-existing mental, emotional, or physical condition under Rule 803(3) of Uniform Rules of Evidence and similar formulations*, 57 A.L.R. 5th 141 (1998).

1985). In *Flett,* a victim's statement that "something upset me" made seven hours after the alleged incident was within 803(3) as it described her continuing stress. *Id.* A declarant may have the same state of mind as he did at an earlier time because the "stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distances up or down the current." *United States v. Cosentino*, 581 F. Supp. 600, 602 (E.D.N.Y. 1984). However, this has limits. In *Cosentino*, statements made to an agent fifteen months after a hijacking failed to be within the stream of continued consciousness required by 803(3). *Id.*

Here, Ms. Fenty's voicemails reflected her state of mind regarding the missing packages. (R. at 72.) Ms. Fenty posed questions and described the emotional state of confusion she felt. *Id.* Further, Ms. Fenty's statements demonstrated her then-existing mental state that "she was engaged in a legitimate plan to help horses," that the medication purchase was legitimate, and she had "no idea that she was involved in an illicit drug scheme." (R. 50-51.)

Further, it is uncontested that the first voicemail "was left at 1:32 p.m. on February 14, 2022, from the post office." (R. at 47.) Ms. Fenty arrived at the post office, realized her packages were missing, and called Ms. Millwood from the site all while under the stress of the moment. (R. at 40.) The second voicemail was left forty-five minutes after the first and relayed current information about her conversation with postal workers, her current anxiety, and further questions. *Id.* These statements reflected her mindset at that moment, a mindset that was connected to her previous feelings and expressions. Ms. Fenty's statements are similar to the statements in *Flett* that were made under the stress of the previous event. Unlike the statements in *Cosentino*, Ms. Fenty's statements occurred shortly after one another and describe a continued flow of feelings. By excluding these statements, which were spoken spontaneously, the jury could not factor Ms. Fenty's mental state into their determination of guilt. The Fourteenth Circuit

exclusion of Ms. Fenty's voicemail statements under 803(3) must be reversed because the Federal Rules do not contemplate spontaneity and juries should decide credibility, however, these statements should still be admitted even if spontaneity is required.

III. Whether a prior petit larceny conviction meets the rigid standard for impeachment under Rule 609(a)(2) of the Federal Rules of Evidence when petit larceny is generally not a crime involving dishonesty or false statements, the offense statute lacked any requirement of deceit, and the factual circumstances underlying the conviction did not involve deceit?

The maxim that the accused are innocent until proven guilty of a crime is woven into American jurisprudence. *See Thompson v. United States,* 546 A.2d 414, 418 (D.C. Cir. 1988). "The accused is not only presumed to be innocent of the crime with which he is charged, but our legal tradition protects him from the possibility of guilt by reputation." *Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976). This protection is critical as juries are likely to believe that because a defendant committed a crime in the past, they must have committed the current one. *Id.* To protect defendants, the Federal Rules of Evidence created guidelines on the admissibility of prior conviction evidence. Fed. R. Evid. 609.

Under 609(a)(2), the Federal Rules allow witness impeachment by proof of a conviction "only if the crime involved dishonesty or a false statement." *United States v. Ortega*, 561 F.2d 803, 805 (9th Cir. 1977). If it is unclear that the past conviction involved dishonesty or a false statement, a prosecutor must prove there is dishonesty or a false statement underlying the conviction. *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). "Rule 609 places the burden of proof on the government." *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976). Rule 609(a)(1) applies only to prior felony convictions and is thus not relevant. *Id.*

By allowing Ms. Fenty to be impeached with prior conviction evidence, the Fourteenth Circuit distorted the true intent of 609(a)(2) and encroached on her presumption of innocence. This Court should adopt the view of the Third, Ninth, and D.C. Circuits which hold that

impeachment for a petit larceny conviction is inadmissible under 609(a)(2) because the crime is not indicative of dishonestly or untruthfulness. In the alternative, this Court should evaluate the facts of Ms. Fenty's conviction, which shows she did not exhibit any dishonesty or untruthfulness that would warrant the conviction under 609(a)(2). Under either scenario, the Court should find the impeachment of Ms. Fenty using her previous conviction was inadmissible to reverse and remand the Fourteenth Circuit's holding below.

A. Ms. Fenty's conviction for petit larceny is not admissible impeachment evidence under 609(a)(2) because the conviction is not indicative of dishonesty or untruthfulness and the statutory elements contain no requirement of deceit.

When evidence of a prior criminal act "reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of innocence." *Toto*, 529 F.2d at 284. The danger that a jury will infer the defendant is predisposed to commit crimes "is even more acute when the witness testifying is the criminal defendant." *Thompson*, 546 A.2d at 424. Because the danger of introducing prior conviction evidence is so high, "Congress carefully and extensively considered the prior crimes impeachment issue, devoting more time to it than any other rule of evidence." *See United States v. Toney*, 615 F.2d 277, 280 (5th Cir. 1980). After consideration, Congress adopted a narrow interpretation of prior conviction use. *Id*. at 282. "The current language of the Rule is unquestionably the product of careful deliberation and compromise." *United States v. Smith*, 551 F.2d 348, 360-61 (D.C. Cir. 1976). This Court should adhere to a narrow interpretation of 609(a)(2) and prevent petit larceny – a crime that lacks dishonesty or untruthfulness – from prejudicing defendants in the name of impeachment.

Rule 609(a)(2) requires an automatic admission for crimes involving "dishonest or false statements." *Hayes,* 553 F.2d at 827. Congress did not intend for automatic admission for all crimes, but only "convictions 'peculiarly probative of credibility," so they defined dishonesty and false statements to narrow the scope of Rule 609(a)(2). *Id*. "Dishonesty and false

statement" are defined by the Conference Committee as,

> "crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully."

553 F.2d at 827 (citing to Conference Report, H.R. No. 93-1597, reprinted 3 Weinstein's Evidence, 609-39 (1976)). Whether a prior conviction for petit larceny may be used to impeach is not a matter of first impression for many Circuits. Several Circuits have held that petit larceny is inadmissible *per se* or *facto inspo* under 609(a)(2). *See Gov't of V.I. v. Testamark*, 528 F.2d 742, 743 (3d Cir. 1976); *United States v. Montrose*, 15 Fed. Appx. 89, 90 (4th Cir. 2001); *Ortega*, 561 F.2d at 806; *United States v. Fearwell***,** 595 F.2d 771, 776 (D.C. Cir. 1978).

Courts have come to this conclusion by looking at the relevant petit larceny statutes to decide whether the crime would "bear on the accused's propensity to testify truthfully." *Hayes,* at 827. The Third Circuit has held that petit larceny does not contain an element of deceit to qualify as a crimen falsi. *Toto*, 529 F.2d at 280. The Court found the evidence was "far out-weighed by the prejudicial effect" it would cause the witness. *Id*. at 282. Similarly, In *Fearwell*, the D.C. Circuit found petit larceny did not qualify for automatic admission under 609(a)(2). 595 F.2d at 776. Petit larceny has "no suggestion of fraud or deceit as an element" and thus was not a crime of deceit but of stealth, "unless specified in the controlling statute." *Id*. Similarly, in *Montrose*, the Court held petit larceny was not admissible under 609(a)(2) because the crime "was not shown to be a crime of dishonesty or false statement." 15 Fed. Appx. at 90.

Other Courts have excluded petit larceny from 609(a)(2) because they refused to diverge from the narrow application of 609(a)(2). In *Ortega*, the Ninth Circuit held that petit larceny did not impact the witnesses' "propensity toward testimonial dishonesty" without needing to assess the statute. 561 F.2d at 806. "Human experience does not justify an inference that a person will

perjure himself from proof that he was guilty of petty shoplifting… [petit shoplifting] is not an indicium of a propensity toward testimonial dishonesty." *Id.* In *Hayes*, the Second Circuit held crimes of force or stealth "such as burglary or petit larceny" do not come within 609(a)(2) for prior convictions that bear on a propensity to testify truthfully. 553 F.2d at 827; *But see, United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005) (holding larceny is assessed by the facts).

Other circuits that have not explicitly ruled on petit larceny have held that "crimes such as theft, robbery, or shoplifting do not involve 'dishonesty or false statements' and are therefore inadmissible under 609(a)(2). *United States v. Seller*, 906 F.2d 597, 603 (11th Cir. 1990); *See also, Howard v. Gonzales*, 658 F.2d 352, 359 (5th Cir. 1981) (citing cases where other theft crimes such as shoplifting or bank robbery did not involve a dishonest or false statement required by Rule 609(a)(2)).

Here, Boerum Penal Code § 155.25 governing petit larceny does not require deceit, dishonesty, or untruthfulness. (R. at 21.) The Fourteenth Circuit held that "where 'the manner in which the witness committed the offense *may* have involved deceit,' the conviction is admissible under Rule 609(a)(2)." (R. at 70.) (emphasis added) However, the Court overlooked two major points. First, when Congress defined "dishonesty or false statements" under 609(a)(2) they did not allow crimes that *may* involve deceit to be automatically included. Rather, Congress advocated for a narrow interpretation of the Rule and only provided admissibility for crimes involving dishonesty or false statements. Many circuits have declined to expand 609(a)(2) because prior conviction evidence is prejudicial and requires the utmost protection. *Thompson,* 546 A.2d at 418 (declining to expand 609(a)(2)); *Ortega,* 561 F.2d at 806 (following the narrow interpretation of the Third Circuit because it "accords with the express intent of the draftsmen of 609, limiting dishonesty and false statements…").

Second, if the underlying circumstances of Ms. Fenty's conviction involved dishonesty or false statements, the Boerum Penal Code has a different statute for that offense. (R. at 21.) Ms. Fenty would be charged with §155.45 Theft by Deception, which states, "a person is guilty of theft of property when that person knowingly and with deceit takes, steals, carries away…" (R. at 3.) The statute defines deceit as something that intentionally "(a) Creates, reinforces, or leverages a false impression, (b) Prevents another from acquiring material information that would impact his or her judgment, or (c) Fails to correct a false impression that the deceiver previously created, reinforced, or influenced." (R. at 3.) Finding that petit larceny does not fall under 609(a)(2) would not conflict with the legislature's intent when drafting the statutes. As Ms. Fenty's conviction for petit larceny does not fall within the guidelines of 609(a)(2), this Court should hold that petit larceny should not have been automatically admitted.

B. Ms. Fenty's conviction for petit larceny should not have been introduced under 609(a)(2) because the prosecution failed to prove the facts of Ms. Fenty's conviction reflected her propensity for dishonesty or untruthfulness.

When a proponent demonstrates the underlying facts of a conviction involve dishonesty or untruthfulness, some circuits allow prior conviction evidence to be used for impeachment under 609(a)(2). *See Estrada*, 430 F.3d at 614; *United States v. Brown*, 603 F.2d 1002, 1029 (1st Cir. 1979). The Advisory Committee stated "dishonesty or untruthfulness" can be shown with admitted facts or jury instructions if the jury had to find the defendant acted with dishonesty or a false statement. Fed. R. Evid. 609 advisory committee's note to 2006 amendment.

If a crime is "characterized by an element of deceit or deliberate interference with a court's ascertainment of truth" it is considered a "crimen falsi." *Smith*, 551 F.2d at 362. Still, misdemeanor convictions that do not relate to a defendant's veracity are "irrelevant as to his credibility." *Albertson v. State*, 554 P.2d 661, 663 (N.M. 1976). To conform to Congress's intent that crimen falsi are a "fairly narrow subset of criminal activity," courts often differentiate

crimes of deceit and crimes committed by stealth or violence. *See Smith*, 551 F.2d at 362.

An underlying conviction is a crime of deceit when false written or oral statements are made. *Hayes*, 553 F.2d at 827-28. Unless the underlying facts of the conviction demonstrate "communicative or expressive dishonesty," the prior conviction is not one of deceit. *United States v. Morrow*, No. 04-355, 2005 U.S. Dist. LEXIS 41035, at *5 (D.D.C. June 2, 2005); *See also People v. Vaughn*, 56 Ill. App. 3d 700, 705 (5th Cir. 1978) (stating dishonesty or false statement is "meant to cover crimes involving testimonial or verbal deceit"). Courts may examine the specific facts of the crime to determine "the manner in which the crime was committed." *United States v. Payton*, 159 F.3d 49, 57 (2d Cir. 1998). In *Payton*, the Circuit concluded lying on a sworn application to receive food stamps would bring larceny under 609(a)(2) because "her conduct arises out of making a false statement." *Id*.

Further, crimes where the ultimate goal is to deceive may be a crimen falsi. *Altobello v. Borden Confectionary Prods., Inc*., 872 F.2d 215, 216 (7th Cir. 1989). In *Altobello*, the Court held a prior conviction that involved "tampering with electric meters of Commonwealth Edison" was "necessarily a crime of deception" because the ultimate goal was to "deceive the meter reader." *Id.* But where the defendant took "elusive action to avoid detection," it is not automatically a crime of dishonesty or false statements. *Estrada*, 430 F.3d at 614. As Judge (now Justice) Sotomayor explained in *Estrada*, while many crimes require "some quantum of stealth," being stealthy does not "constitute a crime of honesty or false statement." *Id.*

While some may argue that any prior conviction reveals a conscious decision to disregard the law and "evinces a lack of character," "Congress has not accepted that expansive theory." *Smith*, 551 F.2d at 363. As such Circuits have determined crimes of force and stealth are not within 609(a)(2)'s automatic admit provision. *Hayes*, 553 F.2d at 827. A crime of force

resembles convictions for murder, felony firearm, robbery, armed robbery, or assault. *Reed-Bey v. Pramstaller*, No. 06-10934, 2013 U.S. Dist. LEXIS 159465, *3 (E.D. Mich. Nov. 7, 2013); *Smith,* 551 F.2d at 362; *Hayes*, 553 F.2d at 827. Crimes that are executed through violence, "generally have little or no direct bearing on honesty and veracity." *Gordon v. United States*, 383 F.2d 936, 940 (1967). Crimes of force are not deceitful because threats that are backed up by violence are substantiated. *See* 551 F.2d at 363. In *Smith*, the Court used an illustration of an armed robbery. *Id*. Because a perpetrator of armed robbery takes a gun and threatens someone, there is no deceit in the threat, because they are able to use force against the individual who does not comply. *Id.*

If a conviction involves "nothing more than stealth, the conviction could not be introduced under [609(a)(2)]." *Hayes*, 553 F.2d at 827-28. Many Circuits have held petit larceny is a crime of stealth rather than deceit. *See, e.g*., *Fearwell***,** 595 F.2d at 776; *Smith,* 551 F.2d at 362. "While much successful crime involves some quantum of stealth, all such conduct does not, as a result, constitute [a] crime of dishonesty or false statement." *Estrada*, 430 F.3d at 614. In *Estrada*, a larceny conviction was not automatically admitted under 609(a)(2) because it did not involve falsity or deceit even though there was an element of stealth present. *Id.* Some Courts have suggested that theft crimes can be crimes of dishonesty. *See United States v. Gunter*, 551 F.3d 472, 483 (6th Cir. 2009); *United States v. Mixon*, No. 98-3004, 1999 U.S. App. LEXIS 14832, at *32 (10th Cir. 1999). Yet as the Fourteenth Circuit Majority admitted, these cases are "without in-depth analysis or further explanation," and choose not to follow a *per se* rule finding theft to be a crime of deceit. (R. at 70.)

Other Courts have taken a more expansive approach in determining whether a crime should be admitted under 609(a)(2) by considering additional factors. For example, a trial court

may consider "the nature of the crime, nearness or remoteness, the subsequent career of the person, and whether the crime was similar to the one charged," when determining the admissibility of a 609 ruling. *Vaughn*, 56 Ill. App. 3d at 705. In *Vaughn,* the Fifth Circuit held impeachment for the defendant's petty larceny conviction was inadmissible under 609(a)(2) because the conviction was seven years old, the defendant was nineteen years old at the time, and the defendant had no other convictions in the interim. *Id.*

The Fourteenth Circuit held that Ms. Fenty's conviction for petit larceny is theft by deceit rather than force and as such should be automatically introduced under 609(a)(2). (R. at 70.) Ms. Fenty's crime arose out of a dare and led her to scamper across Joralemon City Square and attempt to steal a bag from a tourist. (R. at 52-53.) After being noticed, an altercation ensued where Ms. Fenty loudly threatened the tourist and ran away with her bag. (R. at 22.) The majority argued because Ms. Fenty attempted to quietly steal from a tourist who was distracted, her crime was committed by deceit. (R. at 70.) Further, the majority held her crime was not one of force even though Ms. Fenty threatened violence when attempting to steal the bag. *Id.*

That holding ignores the factual circumstances of Ms. Fenty's conviction. Ms. Fenty did not commit a crime of deceit, but rather a crime of stealth. Unlike crimes of deceit that require a false statement orally or in writing, Ms. Fenty was not dishonest and did not make any false statements. This differentiates Ms. Fenty's conviction from the conviction in *Payton,* where the witness' crime arose out of her false statement. Unlike the defendant in *Altobello*, whose ultimate goal was to deceive the meter, Ms. Fenty did not intend to deceive anyone and her crime arose out of impulse with no preparation or repetition. Instead, Ms. Fenty intended to quietly steal the bag without notice from the tourist, making this more similar to a crime of stealth. Crimes of stealth, like petit larceny, do not fall under 609(a)(2).

Looking at what occurred during the larceny, Ms. Fenty's use of a threat and subsequently grabbing the bag out of the victim's hands makes the crime more similar to a crime of force than deceit. Ms. Fenty pushed the tourist and said, "Let it go or I'll hurt you." (R. at 60.) Similar to the illustration of an armed robbery in *Smith*, Ms. Fenty's threats were not based on deceit but the willingness to force the tourist if they did not give up the bag. Further consideration of the facts demonstrates they strike an alarming similarity to those in *Vaughn* which persuaded the Court to prohibit impeachment under 609(a)(2). Like the defendant in *Vaughn*, Ms. Fenty's conviction was also for petit larceny when she was nineteen years old. Where the conviction in *Vaughn* was seven years old, Ms. Fenty's conviction was roughly six years old. Ms. Fenty and the defendant both did not have any other conviction in the interim. As such, Ms. Fenty's petit larceny conviction should not have been admitted under 609(a)(2).

C. By allowing Ms. Fenty to be improperly impeached with a prior conviction, her presumption of innocence was so prejudiced that a limiting instruction could not cure the harm.

This Court should reverse the Fourteenth Court's holding because they did not properly sanitize the impeachment evidence and limiting instructions are not effective to control the jury's bias. When a prosecutor impeaches a defendant with improper prior conviction evidence, the prejudicial effect is profound. Interviews and studies reveal that juries "almost invariably used a defendant's record to conclude that he was a bad man and hence more probably guilty of the crime for which he was standing trial." *Thompson*, 546 A.2d at 425. As put by Judge Aldisert, "A drop of ink cannot be removed from a glass of milk." *Toto*, 529 F.2d at 283.

The Fourteenth Circuit's assertion that a jury instruction mitigated prejudice against Ms. Fenty is erroneous. (R. at 70.) Courts must limit the extent of prior conviction evidence. "Beyond the name of the crime, the time and place of conviction, and punishment, further details such as the name of the victim and the aggravating circumstances may not be inquired

into." *Carlsen v. Javurek*, 562 F.2d 202, 210 (8th Cir. 1975). Yet Ms. Fenty was intensely questioned about her prior conviction. (R. at 58-60.) Rather than asking the limited information necessary to impeach, the prosecutor asked overtly prejudicial and unnecessary questions. *See* (R. at 58-60.) For example, the prosecutor asked, "Didn't you select this particular victim out of the crowd because she looked distracted," "Did the victim scream when you pushed her," and "Did you threaten the victim." (*Id.*) These questions suggested Ms. Fenty was a "bad" person and made it difficult for the jury to separate her prior conviction from the present charge.

The Fourteenth Circuit erroneously held that Ms. Fenty's prior conviction was admissible under 609(a)(2). This Court should overturn that decision because petit larceny is not a crime of deceit, the underlying facts of the crime do not show dishonesty or false statements, and a limiting instruction did not cure the prejudice experienced by the defendant.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the Fourteenth Circuit's decision (1) finding an unreasonable search had not occurred, (2) excluding 803(3) hearsay exception evidence, and (3) admitting improper impeachment evidence against the defendant.

Respectfully Submitted,
/s/ Team 30P
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